No. [redacted] 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

William Spinelli, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on July 31, 1967.

OPINIONS BELOW.

This cause was originally argued before a division of the United States Court of Appeals for the Eighth Circuit. On February 1, 1967, the division rendered its decision, reversing petitioner's conviction, in a majority

opinion written by Circuit Judge Heaney and concurred in by Circuit Judge Van Oosterhout. A dissenting opinion was written by Circuit Judge Gibson. Upon petition of the Government, this decision, which has not been officially reported, was subsequently withdrawn and a rehearing before the Court en banc was ordered. Copies of the division opinions are reproduced in Appendix A.

After reargument before the Court en banc, a decision was rendered on July 31, 1967, affirming petitioner's conviction. The majority opinion was written by Circuit Judge Gibson for six members of the Court. A dissenting opinion was written by Circuit Judge Heaney in which Circuit Judge Van Oosterhout concurred. These opinions have not yet been officially reported. Excerpts of these opinions are reported at 36 L. W. 2127 and 1 Cr. L. 1074, 2308. The majority and dissenting opinions are reproduced in Appendix B.

Certain orders were entered by District Judge Harper in ruling on various pre-trial motions filed by petitioner. These orders were not officially reported and are reproduced in Appendices E, F and G.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 31, 1967 (Appendix L). A timely petition for rehearing filed by petitioner was denied on September 12, 1967 (Appendix M). On October 2, 1967, Mr. Justice White extended the time for filing a petition for writ of certiorari herein to and including November 11, 1967.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

I.

Whether the Government has a right to petition a United States Court of Appeals for rehearing where the Court of Appeals decision reversed petitioner's conviction because a motion to suppress illegally seized evidence should have been sustained by the District Court.

II.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

A. underlying circumstances corroborating the information furnished by the informant, or

B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or

C. facts showing that the informant spoke with personal knowledge, or

D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or

E. all of the essential elements of the alleged offense, or

F. facts as to the commission of a federal offense.

III.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason

for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

IV.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

V.

Whether one of the purposes of a preliminary examination is to afford an accused an opportunity to hear some of the evidence against him, and whether the Government is entitled to a continuance of the preliminary examination for the obvious reason of presenting the matter to the Grand Jury and thereby avoiding the examination and depriving the accused of the right to hear evidence in advance of trial.

VI.

Whether the indictment against petitioner was constitutionally deficient in that it:

A. was vague, uncertain, indefinite, ambiguous and duplicitous, and

B. charged a multitude of offenses, and

C. failed to apprise petitioner of the particulars of the offense, and

D. as applied to petitioner, authorized his conviction for an offense outside the spirit and intent of 18 U. S. C., § 1952, and

E. was based upon a statute which is unconstitutional.

VII.

Whether statements made by petitioner, after his arrest, employment of counsel and appearance before the Commissioner, and required of him as a condition precedent to return of his personal belongings and to his release on bail, were constitutionally inadmissible under Massiah v. United States and related cases.

VIII.

Whether the admission of testimony of an alleged expert witness, including his expression of opinions that a handbook was being operated, bets were being received, a line was being disseminated, and other information was being furnished, constituted an invasion of the province of the jury and deprived petitioner of a trial free from inadmissible evidence.

IX.

Whether the admission of testimony concerning another handbook operation in another part of the City seven months prior to that charged, without evidence connecting the two alleged operations, deprived petitioner of a trial free from inadmissible evidence.

X.

Whether, in a jury instruction pertaining to the violation of Missouri law, the inclusion of offenses not prohibited or not proved, makes the instruction erroneous.

XI.

Whether lack of positive evidence of essential elements of the offense charged against petitioner, his intent and the commission of an overt act, except such as may possibly be created by inferences based upon inferences, vitiates petitioner's conviction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

The constitutional provisions, statutes, and rules of court involved are the following, all of which are set forth in Appendix C:

The Constitution of the United States, First, Fourth, Fifth, Sixth and Tenth Amendments;
18 United States Code, §§ 1952 and 3731;
Missouri Revised Statutes, 1959, § 563.360;
Federal Rules of Criminal Procedure, Rules 5 (c), 7 (c), 14, 41 (c), 41 (d), and 41 (e).

STATEMENT.

Petitioner was tried by a jury and convicted in the United States District Court for the Eastern District of Missouri. Federal jurisdiction was based upon the indictment returned by the Federal Grand Jury charging that petitioner, between August 6, 1965, and August 18, 1965, traveled in interstate commerce from Illinois to Missouri with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, a business enterprise involving gambling, violating Section 563.360 of the Missouri Revised Statutes, 1959, and that petitioner thereafter performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all in violation of Title 18, United States Code, Section 1952. Petitioner was sentenced to imprisonment for three years and a fine of $5,000.00 (Tr. 325).*

* References to the transcript of the proceedings at the trial and post-trial hearing on the motion for new trial and sentencing will be designated "Tr.". References to the transcript of testimony in connection with petitioner's pre-trial motions will be designated "M.".

The evidence material to this petition is summarized as follows:

In November, 1964, two telephones were installed at Apartment F, 9745 Pauline Place, St. Louis, Missouri, under the names of a Ross family. This service was discontinued on March 15, 1965 (Tr. 23-26). In January, 1965, petitioner's automobile was seen in the vicinity of 9745 Pauline Place and he was observed at the apartment premises (Tr. 30-32). A woman who lived below Apartment F testified that she heard telephone conversations and other activity through the floor (Tr. 41-42). F. B. I. Agent Dowd testified at considerable length to conversations which he overheard on January 12 and 13, 1965, while sitting in the bedroom in the apartment below Apartment F. These conversations involved dollar amounts, places and other figures (Tr. 60-79) which were compared with basketball games listed in a local newspaper (Tr. 69-71, 75-81). There were two men in Apartment F at times while the Agent was listening. They addressed each other as "Jack" and "John" (Tr. 73, 82) but he did not know who actually was doing the talking (Tr. 92). Subsequently, petitioner was seen leaving the apartment and driving in the vicinity (Tr. 97-102, 137-138). Petitioner was not arrested at Pauline Place (Tr. 136, 151).

In November, 1964, two telephones were installed at 1108 Indian Circle Drive, Apartment 7, in Olivette, Missouri (a suburb of St. Louis), the telephones being listed under the name of Mrs. Grace P. Hagen (Tr. 114-115). Mrs. Hagen was not further identified and there was no credit information on her in telephone company files (Tr. 120). There was no evidence of any use made of the telephones until they were disconnected on August 18, 1965.

There was no evidence of any activities of petitioner between January 13, 1965, and the end of July, 1965. There

was evidence that on various dates between August 6, 1965, and August 18, 1965, petitioner was observed leaving a residence in Fairview Heights, Illinois, and driving his automobile to one of the bridges leading to St. Louis. This usually occurred in the morning and he entered the bridge around noontime or shortly before noon (M. 3-6, Tr. 121-125). There was also evidence, to which petitioner objected, that the car was parked on the east or Illinois side during early morning hours between July 22 and August 5, 1965 (Tr. 125-127).

On the days that petitioner was seen to drive onto the bridges, he was also observed exiting from the bridges on the St. Louis side. Later, on these and other occasions, petitioner or his car was seen in the vicinity of 1108 Indian Circle Drive (M. 21-22, 33-34, Tr. 141-143, 160-163). On one occasion petitioner was seen entering Apartment F (M. 37, Tr. 134). There was usually a period of four hours between the time petitioner was seen leaving the bridge and the time he was seen in the vicinity of Indian Circle Drive. He was never followed for more than a few blocks after he left the bridge and it took about thirty minutes to drive from the bridge to Indian Circle Drive (M. 18-19, 24, Tr. 152-153). Petitioner produced evidence that upon leaving the bridge he generally spent several hours at a stock broker's office in downtown St. Louis (Tr. 245-247).

On August 18, 1965, after observing petitioner leave the Eads Bridge, the agents prepared an affidavit for a search warrant which was issued by the United States Commissioner for a search of Apartment F at 1108 Indian Circle Drive (M. 7, 25-26). A copy of the affidavit is attached hereto as Appendix D.

The agents arrived at the building at approximately 4:55 P. M., and went into Apartment H across the hall from Apartment F, and waited until 7:05 P. M. At that

time they saw petitioner leaving Apartment F and the agents emerged from Apartment H and arrested him (M. 14, 26-27, Tr. 143-145). A search of petitioner's person revealed some keys, one of which opened the door to Apartment F (M. 20, Tr. 147). Petitioner was taken downtown and booked while other officers remained on the premises and conducted a search (M. 12, Tr. 147). No effort was made to break into the door or to arrest petitioner between 4:55 and 7:05 P. M. (M. 18, Tr. 155-156). While the search was being conducted, John Vainikos entered the apartment with a key but was not arrested (M. 28, Tr. 184).

The agents who conducted the search of the premises first took photographs and then seized a number of items from the premises (M. 28-29, Tr. 166-170, 173-180). These items consisted of pieces of paper, written notations, money, telephones, adding machine, pencils and paper, a lease, radio, pencil sharpener, glasses, wristwatch, and publications pertaining to baseball games. Most of the items were sent to the F. B. I. Laboratory in Washington (Tr. 181).

The seized exhibits were identified and explained by an F. B. I. Agent from Washington. Petitioner's objection to his qualifications was overruled (Tr. 199). He identified the papers as being associated with a handbook operation and explained their use and purpose and related some of the betting tabs to sports events listed in the newspapers (Tr. 200-217). He was also permitted over petitioner's objection to express opinions that baseball and horse bets were being taken (Tr. 217). As a handwriting expert, he made some handwriting tests but could not say that the papers were written by petitioner (Tr. 220-221), and he could not tell who wrote the bulk of the writing (Tr. 228-229). The items of evidence were also examined for fingerprints in Washington, but they failed to disclose any latent fingerprints (Tr. 230).

After his arrest petitioner was taken downtown and was released on bail the following day. Over objection of petitioner, the F. B. I. Agent testified that petitioner identified one of the keys taken from his possession as being to a residence where he stayed on the east side (Tr. 150). When he was released on bail he gave an address in Caseyville, Illinois, to the Deputy United States Marshal, who testified that petitioner could not be released on bail without giving an address (Tr. 236-237).

The matter was set before the United States Commissioner on September 3, 1965, but the preliminary examination was continued at the request of the Government so that the matter could be presented to the Grand Jury. Petitioner objected to the postponement of the preliminary examination, insisting that he was entitled to such an examination.

On September 15, 1965, petitioner was indicted, it being charged that between August 6, 1965, and August 18, 1965, he traveled in interstate commerce from the State of Illinois to the State of Missouri with the intent to carry on a business enterprise involving an unlawful activity, to-wit, gambling in St. Louis County, Missouri, in violation of Section 1952, Title 18, United States Code. Petitioner filed several motions with reference to this indictment, including a motion to dismiss based upon the ground that the indictment failed to allege any overt acts subsequent to travel. On November 18, 1965, the original indictment was dismissed at the Government's request because it was superseded by a second indictment, which was the indictment on which petitioner was tried.

After the second indictment, petitioner filed several pre-trial motions. The motion to dismiss the indictment was overruled, the motion to suppress indictment and for other appropriate relief was overruled, the motion to require United States to elect was overruled, the motion

to suppress evidence was overruled on the ground petitioner had no standing to protest the search,* and the motion for bill of particulars was sustained in part and overruled in part. (See Appendix E and F.) The bill of particulars filed by the Government made reference to dates earlier than August 6, 1965, and referred to the location at 9745 Pauline Place. Petitioner then filed a motion to strike portions of the bill of particulars and to require further particulars, which motion was sustained in part by striking the earlier dates and the reference to 9745 Pauline Place. (See Appendix G.) At the trial, the Government, over petitioner's objection, was permitted to introduce the above-mentioned evidence of the earlier dates pertaining to Pauline Place.

At the close of all of the evidence petitioner filed a motion for judgment of acquittal upon which the Court reserved ruling.

The jury returned a verdict of guilty. After petitioner's motion for judgment of acquittal or, in the alternative, motion for new trial was overruled, he duly appealed to the United States Court of Appeals for the Eighth Circuit. The cause was originally argued before and decided by a division of the Court consisting of Circuit Judges Heaney, Van Oosterhout and Gibson.

On February 1, 1967, the division rendered a 2-1 decision, in which Judge Heaney wrote the majority opinion with the concurrence of Judge Van Oosterhout, and Judge Gibson wrote a dissenting opinion. (See Appendix A.) Judge Heaney held that the affidavit upon which the search warrant was issued did not provide the basis for probable cause. Therefore, the search warrant and the search were violative of the Fourth Amendment to the

* The Court of Appeals unanimously ruled that petitioner did have standing. The government's petition for rehearing after the divisional opinion of February 1, 1967, did not question this ruling by the Court of Appeals.

Constitution of the United States. Petitioner's conviction was reversed. (See Appendix H.)

The Government filed a petition for rehearing en banc or, in the alternative, for a rehearing. This petition was granted and the rehearing was ordered before the Court en banc. (See Appendix I and J.) Petitioner and the Government submitted supplemental briefs and the cause was then reargued before the Court en banc. At the re-argument, petitioner questioned the jurisdiction of the Court en banc to rehear the matter because of the lack of authority for the filing of a petition for rehearing by the Government.

On July 31, 1967, the Court of Appeals en banc affirmed the conviction by a 6-2 vote. (See Appendix K and L.) The majority opinion written by Judge Gibson overruled the jurisdictional question as to the right of the Government to petition for rehearing, and overruled all of petitioner's arguments. Judge Heaney, with the concurrence of Judge Van Oosterhout, wrote a dissenting opinion on the search and seizure question. (See Appendix B.)

Thereafter petitioner filed a petition for rehearing before the Court of Appeals en banc, but this petition was denied without opinion on September 12, 1967. (See Appendix M.)

REASONS FOR GRANTING THE WRIT.

Petitioner believes that there are numerous reasons for review on writ of certiorari of the decision of the Court of Appeals. Eleven major questions have been presented for review. The reasons why petitioner believes these questions should be reviewed by the Court are:

1. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals. (See Questions II, V, VIII, IX and XI.)

2. The decision of the Court of Appeals rules on an important state question in a way in conflict with applicable state law. (See Question X.)

3. The decision of the Court of Appeals decides important questions of federal law which have not been, but should be, settled by this Court. (See Questions I, III, IV and VI.)

4. The decision of the Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court. (See Questions II and VII.)

5. The rehearing of this cause by the Court of Appeals departed from the accepted and usual course of judicial proceedings, and guidelines thereon should be established by this Court for the benefit of the Courts of Appeals. (See Question I.)

In the order in which the questions have heretofore been presented, they will now be discussed in this argument so as to amplify the reasons why petitioner believes it is important for this Court to review the decision of the Court of Appeals on each of these questions. (For the convenience of this Court, petitioner will restate each question presented prior to the argument.)

I.

Whether the Government has a right to petition a United States Court of Appeals for rehearing where the Court of Appeals decision reversed petitioner's conviction because a motion to suppress illegally seized evidence should have been sustained by the District Court.

On February 1, 1967, the division of the Court of Appeals, by a 2-1 decision, reversed petitioner's conviction on the ground that evidence had been illegally seized and petitioner's motion to suppress the evidence should have been sustained. (See Appendix A and H.) Thereafter the

Government's petition for rehearing en banc or, in the alternative, for a rehearing was granted, and a rehearing was ordered before the Court en banc. (See Appendix I and J.) Petitioner believes that the Government did not have the right to file a petition for rehearing, but the Court of Appeals rejected petitioner's argument.

So far as we can determine, this precise point has never been ruled by this Court or any other court. Thus, we have an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals seems to rely for authority upon the review granted to the Government by this Court in **United States v. Ventresca**, 380 U. S. 102. However, the Ventresca opinion does not indicate that the Government's right to review was questioned by the defendant there.

Granting the Government a right of rehearing is contrary to the spirit of the Fifth Amendment prohibition against double jeopardy. **Forman v. United States**, 361 U. S. 416, which seemingly rejects the double jeopardy argument and which is cited by the Court of Appeals, should be limited to its facts because the effort there was not, as here, to reverse the earlier Court of Appeals opinion but merely to change the final mandate. The Forman case also does not discuss the effect of 18 U. S. C., § 3731, which sets forth the statutory right of the Government to appeal.

If the District Court had initially ruled as the Court of Appeals said on February 1, 1967, that it should have ruled and sustained the motion to suppress the evidence, the Government clearly would not have been entitled to appellate review of such ruling. See **Carroll v. United States**, 354 U. S. 394. Inasmuch as 18 U. S. C., § 3731 does not grant the right to the Government to appeal from a District Court ruling suppressing evidence, there is no

reason why the Government should have a greater right when the matter reaches the Court of Appeals. The opinion of the Court of Appeals is at least entitled to the same degree of finality as is afforded an opinion of the District Court.

The Court of Appeals did not discuss **Sapir v. United States**, 348 U. S. 373. We believe this decision, and especially the concurring opinion of Mr. Justice Douglas, sustains our position that once the Court of Appeals ordered the conviction reversed because the motion to suppress should have been sustained, the Government had no further right to rehearing. This is so whether the right to review is limited by the Fifth Amendment or by the statutory restrictions on Government appeals.

For the reason that this is an important matter of first impression and that the Court of Appeals has departed from the accepted course of judicial proceedings by giving the Government a right to appeal that it does not legally possess, we respectfully submit that certiorari should be granted as to Question I.

II.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

A. underlying circumstances corroborating the information furnished by the informant, or

B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or

C. facts showing that the informant spoke with personal knowledge, or

D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or

E. all of the essential elements of the alleged offense, or

F. facts as to the commission of a federal offense.

The judges of the Court of Appeals differed as to the validity of the search warrant and the affidavit in support of it. (For the convenience of this Court, we have included the entire affidavit of F. B. I. Agent Bender in Appendix D.) The sharp differences of opinion are readily apparent from the majority and dissenting opinions rendered on February 1, 1967, and July 31, 1967. See Appendix A and Appendix B. We believe that the last majority opinion is erroneous for numerous reasons hereinafter detailed and is in conflict with decisions of other Courts of Appeals and of this Court.

A. The affidavit of F. B. I. Agent Bender stated: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." This was the only allegation in the entire affidavit of any illegal activity by petitioner. The mere conclusions of the informant are not sufficiently corroborated to justify the issuance of the search warrant.

The majority opinion seems to hold that there is corroboration in the allegations of repeated interstate travel, repeated visits at the apartment, the existence of two telephones, and affiant's reputation as a gambler. Whatever facts are detailed in the affidavit do not, however, corroborate the conclusion of the informant that petitioner was engaged in unlawful activities. Interstate travel, visiting an apartment, and two telephones do not constitute illegal conduct. There was no factual corroboration of

the alleged illegal activity, the operation of a handbook. As said in **Aguilar v. Texas**, 378 U. S. 108, 114:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, **Jones v. United States**, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were . . ." (or here, that William Spinelli was operating a handbook, etc.).

In the Aguilar case, the affidavit stated that the officers had received reliable information from a credible person that narcotics were being stored. The language of the affidavit is almost identical to that in the instant affidavit. The language of the Aguilar opinion is equally applicable to the present case (l. c. 113-114):

> "The vice in the present affidavit is at least as great as in **Nathanson** and **Giordenello**. Here the 'mere conclusion' that petitioner possessed narcotics (was operating a handbook) was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein', it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession (that defendant was operating a handbook). The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'"

Compare the detail contained in the affidavit in **United States v. Ventresca**, 380 U. S. 102, in which the search warrant was sustained.

In **Riggan v. Virginia**, 384 U. S. 152, this Court in a per curiam order reversed the lower court judgment on the authority of the Aguilar case. The dissenting opinion indicated the contents of the affidavit, which had far more detail than the affidavit in the present case.

We believe that the majority opinion is in conflict with numerous decisions of this Court, including the foregoing, which set forth the principle that if hearsay allegations originating from an unidentified informant are relied upon in an affidavit for a search warrant, the underlying circumstances supporting the allegations must be set forth, or the affidavit will be insufficient to show probable cause.

B. As stated in the Aguilar case, supra, at 114-115:

> "... the magistrate must be informed of ... some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see **Rugendorf v. United States**, 376 U. S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' **Giordenello v. United States**, supra, at 486; **Johnson v. United States**, supra, at 14, or as in this case, by an unidentified informant."

Whether the requirements of a credible informant and reliable information are conjunctive or disjunctive is immaterial in the instant case because there is neither. As pointed out in part A hereof, the affidavit contained nothing to corroborate the information and to show that it

was reliable. There was no specific detail furnished by the alleged informant and repeated in the affidavit concerning the operation of the alleged handbook. It was, at the most, an unsupported conclusion.

With reference to the credibility of the informant there were no allegations to indicate any prior use of this informant. The affidavit stated that "the Federal Bureau of Investigation has been informed by a confidential reliable informant" of certain information. (It is significant that the agent who made the affidavit did not even allege that he had received this information—only that the F. B. I. had been informed.) There was nothing in the affidavit nor anything presented to the Commissioner which proved the credibility of the informant as required by the Aguilar and subsequent cases. The majority opinion does not point out any underlying circumstances of his credibility and seemingly is satisfied that the hearsay information came from one "sworn to be reliable".

There was here nothing on the credibility of the informant similar to the prior use of the informant which was found sufficient in **McCray v. Illinois**, 386 U. S. 300, and **United States ex rel. Rogers v. Warden**, 2 Cir., 381 F. 2d 209.

C. As previously noted, the Aguilar case, quoting from **Giordenello v. United States**, 357 U. S. 480, 486, stated that the affidavit not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," but it did not even contain an affirmative allegation that the unidentified source spoke with personal knowledge. This deficiency is similarly apparent in the affidavit in this case. There is nothing to indicate that the informant's conclusion as to petitioner's alleged illegal activity was based on the informant's personal knowledge, such as, by placing a wager, or personally receiving wagering information, or

actually seeing the handbook in operation. And, of course, the affiant Bender had no such personal knowledge; in fact, he himself did not even receive the information directly from the informant.

The majority of the Court of Appeals completely disregarded this requirement of personal knowledge. It conflicts, by its silence, with the applicable decisions of this Court.

D. The majority opinion fails to comment on the fact that the affidavit did not allege the time of the occurrence of the information furnished by the informant, or the time that he learned of it, or the time of receipt of such information by the Federal Bureau of Investigation. In this connection, the opinion is in conflict with **Rosencranz v. United States**, 1 Cir., 356 F. 2d 310. There it was held that the use of the present tense was not sufficient to overcome the deficiency in failing to aver the time when the informant became aware of the law violation or the time when he conveyed this information to the affiant. The omission of time is all the more significant in a proceeding involving Section 1952 of Title 18, U. S. C., because the overt act must occur after the travel. (As originally introduced, Section 1952 did not require a subsequent overt act, but Congress amended the law prior to adoption to require such an overt act. See sections relating to purposes of amendments in Senate Judiciary Committee Report No. 644, dated July 27, 1961, and House Judiciary Committee Report No. 966, dated August 17, 1961, and Conference Report No. 1161, dated September 11, 1961, 87th Congress, 1st Session.)

E. At the time of the issuance of the search warrant, petitioner was about to be arrested for violation of 18 U. S. C., § 1952. The search warrant, warrant of arrest and complaint specifically referred to this section, but at that time the Government was apparently not aware

of what constituted all of the elements of the offense under Section 1952. The certified transcript of the record filed by the Clerk of the Court of Appeals should reveal that an earlier indictment against petitioner was dismissed by the Government upon petitioner's motion and a new indictment on which petitioner was tried was obtained, because the original indictment omitted one of the basic elements of the offense, to-wit, the commission of an overt act after the alleged interstate travel with the requisite intent. The elements of the offense under Section 1952 are threefold: (1) interstate travel, (2) the requisite intent, and (3) overt acts after travel in furtherance of the unlawful activity. The affidavit of the F. B. I. Agent alleged the travel in interstate commerce but there was absolutely no allegation of the commission of an overt act after the travel. Thus, the affidavit was deficient because it failed to include all of the essential elements of the offense.

F. Because of the failure to allege any overt acts subsequent to the interstate travel, the affidavit did not allege the commission of a federal crime, as required by **Thomas v. United States**, 5 Cir., 376 F. 2d 564. When the majority opinion referred to "probable cause to believe the law was being violated" and to "a sufficiently clear picture of a probable violation of the law", it could only refer to a state law violation, if any. There was no description of the elements of an offense against the laws of the United States. For the 8th Circuit Court of Appeals to sustain the affidavit here puts it in apparent conflict with the 5th Circuit decision in the Thomas case, and this conflict should be resolved by this Court.

* * * * * * * *

Because of the conflict with decisions of the Supreme Court and other Courts of Appeals (and indeed the conflict which obviously exists in the Court of Appeals for

the Eighth Circuit*), and because of the importance of delineating the facts and corroboration which necessarily must be included in an affidavit to give constitutional basis to a search warrant, we respectfully submit that certiorari should be granted as to Question II.

III.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

Rule 41 (c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall command the officer to search forthwith the person or place named for the property specified." The search warrant in this case directed the officer: "You are hereby commanded to search forthwith the place named for the property specified . . ."

The evidence at the hearing on the motion to suppress showed that the officers arrived at the apartment building at approximately 4:55 P. M., concealed themselves in an apartment across the hall, and waited until 7:05 P. M. when the defendant emerged from Apartment F (M. 13-14, 16-17). When asked the reason for waiting two hours and ten minutes, Agent Bender stated: "Well, we wanted

* We believe that the cogent arguments and numerous authorities cited by Judge Heaney in his dissenting opinion are so well presented that they should be fully repeated to show the significance of this case and the necessity for determination of this search question by the Supreme Court. We will not further lengthen this portion of the petition except to commend the reader to the opinion of Judge Heaney.

to observe Mr. Spinelli come out of Apartment F, the apartment in question, and consequently this was the only spot that we could utilize under the circumstances, and we did utilize the apartment, and we did see Mr. Spinelli come out of Apartment F" (M. 17). He further acknowledged that no effort was made to enter the premises either by force or invitation (M. 18).

The only federal case touching this subject is **Mitchell v. United States**, D. C. Ct. App., 258 F. 2d 435, in which it was held that a search warrant issued five days prior to execution was valid. However, as pointed out in the majority opinion herein, the Mitchell case does not "invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous." But the majority opinion then proceeds to differ with the views expressed by Judge Bazelon in his concurring opinion in the Mitchell case. After reviewing a number of state cases, Judge Bazelon concludes that the officer has no discretion to withhold the execution of the search warrant in order to wait for the best time to serve it, and that the warrant must be served as soon as possible after it has been issued. By holding that the officer may wait a period of two hours and ten minutes before the execution of the search warrant, without any explanation as to his reasons for doing so, the majority opinion is thus in conflict with Judge Bazelon's opinion.

The majority opinion further requires the person challenging the search to maintain the burden of proving that he was prejudiced by the delay in executing the search warrant. No authority is cited for this proposition, and if there is none, then this is an important question of federal law which should be settled by this Court. To place the burden of proof on the petitioner is an unreasonable and probably impossible requirement and would open the way for unbridled abuse by the officers

of the constitutionally controlled area of searches and seizures.

We believe that the law does not, nor should it, require the defendant to prove prejudice resulting from the unexplained delay. This would be an unreasonable burden not required by Rule 41 (e) of the Federal Rules of Criminal Procedure. In the related area where the issue is one of probable cause, this Court has never required that prejudice be shown—only that the defendant have standing to contest the search. **Jones v. United States**, 362 U. S. 257. The burden of proving prejudice is not thrust upon the person objecting to the search where officers have improperly broken doors without giving the required notice of their authority and purpose. **Miller v. United States**, 357 U. S. 301; **Wong Sun v. United States**, 371 U. S. 471. Why should proof of prejudice be required where the officers enter belatedly and not where they enter prematurely?

An unreasonable search, whether because of the absence of probable cause or because of improprieties in the method of execution, is an important constitutional question. Where a violation of constitutional magnitude occurs, we suggest that it is conclusively prejudicial. See **Davis v. United States**, 8 Cir., 247 F. 394, 398, and **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921. At the very least, the burden should be upon the Government to prove beyond a reasonable doubt that the error was harmless. **Chapman v. California**, 386 U. S. 18, 24.

This Court should determine whether a law officer has uncontrollable authority to delay the execution of a search warrant. This is an important Fourth Amendment question which should be decided, lest law enforcement officers further abuse the role of the search warrant. If the decision hinges on whether or not there is prejudice, then we submit that this Court should impose that burden on the Government rather than the defendant.

For the reason that this is a matter which, if uncontrolled, will lead to constitutional abuses in the methods of executing search warrants, a decision on this issue of first impression is necessary, and we respectfully submit that certiorari should be granted as to Question III.

IV.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

Rule 41 (c) of the Federal Rules of Criminal Procedure states that the search warrant "shall command the officer to search . . . for the property specified." The Fourth Amendment, as to search warrants, uses the language: "particularly describing the . . . things to be seized."

The property specified in the search warrant was "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." Among the items seized, according to the inventory made by the searching officers, were the following: Underwood Adding Machine in brown case, pencil sharpener, stack of blank deposit tickets on State Bank of Wellston, G. E. A. M.-F. M. radio, $22.00 in currency, a pair of glasses, Timex watch, pads of graph paper, four pens, two pencils, lease of premises, and five telephones.

The majority opinion of the Court of Appeals justifies the seizure of these items as being within the general category of "bookmaking paraphernalia." We submit that such a ruling gives an unnecessarily broad definition to the term "bookmaking paraphernalia," contrary to

the command of Rule 41 (c) and the Fourth Amendment. In effect, it would give unlimited authority to the searching officers to seize anything they desired under a general warrant. See **Marron v. United States**, 275 U. S. 192, and **Stanford v. Texas**, 379 U. S. 476. If "bookmaking paraphernalia" can be so broadly construed, then there would be no necessity to specify the other items particularized in the search warrant. Is it not anomalous to describe two telephones in the search warrant and, when the officers seize five, to hold that the additional three are not telephones but "bookmaking paraphernalia."

Because the term "bookmaking paraphernalia" has not been construed by this Court, and because of the unreasonably broad definition given to it by the Court of Appeals, and because of the limitless authority which searching officers in the future may assert as a result of such a general warrant, we believe that this is an important question of federal constitutional law which should be settled by this Court, and we respectfully submit that certiorari should be granted as to Question IV.

V.

Whether one of the purposes of a preliminary examination is to afford an accused an opportunity to hear some of the evidence against him, and whether the Government is entitled to a continuance of the preliminary examination for the obvious reason of presenting the matter to the Grand Jury and thereby avoiding the examination and depriving the accused of the right to hear evidence in advance of trial.

After petitioner's arrest on August 18, 1965, he requested a preliminary examination which was scheduled for September 3, 1965. At that time, over petitioner's objection that the sole purpose of the Government's requested continuance was to delay the examination for

presentation of the matter to the Grand Jury in ex parte secret proceedings and thereby to deprive petitioner of the opportunity to hear witnesses against him, the Commissioner granted the continuance. Prior to the next setting, petitioner was indicted; he never had a preliminary examination.

The majority opinion of the Court of Appeals suggests that the preliminary examination provided by Rule 5 (c) of the Federal Rules of Criminal Procedure is not a discovery proceeding, and that an accused has no absolute right to its discovery benefits. In this respect there is conflict with the view of the Court of Appeals for the District of Columbia in **Drew v. Beard**, 290 F. 2d 741, and **Ross v. Sirica**, 380 F. 2d 557. In the Ross case, the Court quoted from **Blue v. United States**, D. C. Ct. App., 342 F. 2d 894, 901, and said (l. c. 559):

> "... the preliminary hearing is an important right of an accused affording him ... 'a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.' ... Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment."

We believe that the majority opinion's reliance on **Jaben v. United States**, 381 U. S. 214, is misplaced. In the Jaben case there was no objection to the continuance of the preliminary examination, and even under the particular statutory provision there involved, the Court intimates that the preliminary examination must be held within a reasonable time. The issue in this case—continuance for purpose of avoidance*—was not involved in the Jaben case.

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* If an accused can be denied a preliminary examination, then in the interest of fairness and justice petitioner should have

Without an opportunity to have a preliminary hearing and to hear at least a prima facie portion of the Government's evidence, without an opportunity to take depositions except under the very limited provisions of Rule 15 of the Federal Rules of Criminal Procedure, and without an opportunity to even know the identity of the Government witnesses, petitioner was severely handicapped in preparing his defense. This procedure, combined with the vagueness of the indictment in the instant case, made a mockery of the Sixth Amendment to the Constitution of the United States, because petitioner was denied his right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The Constitutional provisions are meaningless and the assistance of counsel is of doubtful value without the means to prepare in advance for trial.

Because of the conflict between the decisions of the Court of Appeals for the Eighth Circuit and the Court of Appeals for the District of Columbia and because of the misapplication of a decision of this Court, we respectfully submit that certiorari should be granted as to Question V.

VI.

Whether the indictment against petitioner was constitutionally deficient in that it:

A. was vague, uncertain, indefinite, ambiguous and duplicitous, and

B. charged a multitude of offenses, and

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been given an opportunity to determine the identity of the Government's witnesses and to take their depositions prior to trial. A criminal trial is not a game of chance. A defendant should not be subjected to the surprise of learning for the first time at the trial the nature of the evidence against him.

C. failed to apprise petitioner of the particulars of the offense, and

D. as applied to petitioner, authorized his conviction for an offense outside the spirit and intent of 18 U. S. C., § 1952, and

E. was based upon a statute which is unconstitutional.

A. Rule 7 (c) of the Federal Rules of Criminal Procedure states that "the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This indictment violated this Rule because it charged a multitude of sins and was vague, uncertain, indefinite, ambiguous and duplicitous. It charged offenses between August 6th and August 18th, 1965. By copying the language of 18 U. S. C., § 1952, it charged the defendant with a multiplicity of offenses in intending "to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity . . ." There was no specification of this unlawful activity except a vague reference to a business enterprise involving gambling, with a citation of a Missouri Statute which also prohibits a variety of offenses. The allegation of overt acts repeated the vagueness of § 1952.

This was no more than a "bare-bones" indictment in statutory language. There were no specific acts charged in the indictment, as was done in **Marshall v. United States**, 9 Cir., 355 F. 2d 999. For all that the indictment stated, petitioner might just as well have been handed a copy of § 1952 and told to prepare his defense. We submit that the Sixth Amendment requires more.

B. The statute under which petitioner was indicted, 18 U. S. C., § 1952, prohibits a multitude of sins. The indictment went even further by charging commission of

offenses, in the vague statutory language, over a period of thirteen days. Thus, petitioner was charged with a multitude of offenses, but the trial court refused to require the Government to elect the offense on which petitioner was to be tried. (See Appendix E.)

The Court of Appeals held that there was no abuse of discretion in denying the motion to require the Government to elect, although conceding that these were "broadly worded charges." When the multiplicity of charges is coupled with the denial of information to petitioner resulting from the refusal of a preliminary examination and the limitations of information granted on the sustaining of petitioner's motion for bill of particulars, we believe that the ultimate effect was prejudicial to petitioner because he had no way of knowing the precise charge which he was required to defend. The various combinations of possibilities under the indictment, spread over a 13-day period, resulted in a multitude of alleged offenses. The impossibility of defending deprived petitioner of his rights to be informed of the nature and cause of the accusation, guaranteed by the Sixth Amendment, and due process of law, guaranteed by the Fifth Amendment.

C. Because of the multiplicity of charges, petitioner filed a motion for bill of particulars seeking exact dates, locations, details of operation and a determination of whether he was charged with promoting, managing, establishing and carrying on or facilitating the promotion, management, establishment and carrying on of an unlawful activity. In addition, petitioner sought other relief in the motion for bill of particulars. After the trial court granted limited relief (Appendix F), which petitioner believes was not sufficient to enable him to prepare his defense, the Government pleaded in the bill of particulars matters beyond the scope of the indictment. In particular,

the Government pleaded dates of alleged operation of a handbook prior to the dates specified in the indictment and pleaded two locations, one of which related to the earlier dates. On a subsequent motion by petitioner, these earlier dates and the location at 9745 Pauline Place were ordered stricken by the Court. (See Appendix G.)

The information contained in the bill of particulars was not sufficient to fully apprise petitioner of the nature of the charges against him, especially as they developed at the trial, and thus he was deprived of his constitutional rights. Furthermore, the permission to the Government to introduce at the trial those matters which had been ordered stricken in the bill of particulars confronted petitioner with a surprising set of facts about which he not only had had no opportunity to prepare a defense but was actually misled into believing that there would be no issue over these earlier dates or the earlier place.

The majority opinion of the Court of Appeals approves the denial of the information requested by petitioner and the subsequent admission of the very evidence which had been ordered stricken from the bill of particulars. The opinion justifies the denial of information on the ground that to furnish it would have frozen the Government's evidence in advance of trial. This Court ought not to permit a rule of law which places a defendant in the position of an interested spectator at the trial, hearing for the first time what the Government's evidence is against him. A defendant should be informed in advance of the basics of the Government's evidence so that he might prepare his defense to this evidence. Keeping secret the identity of the Government witnesses further increases the hazard. As previously suggested, a criminal trial is not a game of chance. If a defendant is to be adequately represented, he should have the information in advance of trial with which to be able to undertake his defense.

D. The legislative history of 18 U. S. C., § 1952, including the testimony of the Attorney General in support of the Bill, indicates that its intent was to affect organized crime, not the sporadic involvement of one individual. See Report No. 644, dated July 27, 1961, of the Senate Judiciary Committee, and Report No. 966, dated August 17, 1961, of the House Judiciary Committee, 87th Congress, 1st Session. The evidence in this case did not show a business enterprise involving a number of individuals; at the most it was a sporadic operation by one person. It was the sort of operation, if it existed, which could easily have been left to local authorities to control.

All of the reported decisions under Section 1952 relating to gambling enterprises involve numerous defendants and participants. Research has revealed no gambling case in which a single individual was prosecuted under the statute for his activities alone. All of the cases involved multiple defendants or factual situations where individual defendants were working back and forth across state lines, transporting other persons or causing other persons to cross state lines for the purpose of maintaining a business enterprise. The instant case does not fall into that category, and the Government's evidence failed to show a "business enterprise" within the spirit and intent of Section 1952.

E. We believe that 18 U. S. C. § 1952 is unconstitutional because it violates:

(1) the First Amendment's right peaceably to assemble,

(2) the First Amendment's right of freedom of speech,

(3) the Fifth Amendment's prohibition against double jeopardy,

(4) the Fifth Amendment's guarantee of due process in the vagueness, indefiniteness and voidness for want of certainty as to standards of conduct,

(5) the Fifth Amendment's guarantee of due process in the denial of equal protection of the laws arising out of the differences in laws of various states,

(6) the Sixth Amendment's right to trial in the state and district wherein the alleged crime shall have been committed, and

(7) the Tenth Amendment's reservation of powers to the states pertaining to matters exclusively within the jurisdiction of the states and not the federal government.

There have been several dozen reported decisions construing Section 1952 but none by this Court. Because of the growing number of prosecutions under this relatively recent statute and the serious constitutional as well as procedural and evidentiary problems which have arisen, we believe that a determination of the constitutionality of Section 1952 ought to be made by this Court. The application of the statute to petitioner in this case has created important questions of federal law which have not been, but should be, settled by this Court. We respectfully submit that certiorari should be granted as to Question VI.

VII.

Whether statements made by petitioner, after his arrest, employment of counsel and appearance before the Commissioner, and required of him as a condition precedent to return of his personal belongings and to his release on bail, were constitutionally inadmissible under Massiah v. United States and related cases.

After petitioner had been arrested and brought before the Commissioner and after he had hired an attorney, he went to the arresting F. B. I. Agent to obtain certain keys which had been seized from him at the time of his arrest. Before giving him the keys, the Agent asked him to identify them. Petitioner indicated that one of the

keys was to his place of residence across the state line. The F. B. I. Agent was permitted to testify to this conversation over petitioner's objection (Tr. 148-150). The Government also called a Deputy United States Marshal who testified, over petitioner's objection, that at the time of his release on bail, petitioner gave an address in Illinois (Tr. 233-236). On cross-examination the Deputy Marshal acknowledged that petitioner would not have been released on bail without giving an address (Tr. 237).

The majority opinion of the Court of Appeals found that petitioner's Fifth Amendment privilege against self-incrimination was not violated. Recognizing that petitioner would not have been released on bail without giving the information to the Deputy Marshal and acknowledging that petitioner "was faced with a difficult choice", the Court stated that it was a choice that he had to make. Assuming, without conceding, that address information is an absolute necessity for release on bail, this should not necessarily render such information admissible in evidence.

The statements required of petitioner were involuntary and forced from him, contrary to the doctrine of **Massiah v. United States**, 377 U. S. 201. See also **Albertson v. SACB**, 382 U. S. 70, and **Beatty v. United States**, per curiam reversal by this Court on October 23, 1967 in No. 338, on the authority of the Massiah case, of decision of the Fifth Circuit reported at 377 F. 2d 181.*

The majority opinion would force petitioner to make a choice between self-incrimination and the denial of bail—a choice "between the rock and the whirlpool". See **Garrity v. New Jersey**, 385 U. S. 493, where incriminating

* The issue involved in this Question is in some respects analogous, although factually stronger, than that presented in three cases argued before this Court on October 10-11, 1967: **Marchetti v. United States**, No. 2; **Grosso v. United States**, No. 12, and **Haynes v. United States**, No. 236.

statements made by a police officer under threat of loss of his job were held to be inadmissible. Furthermore, the denial of bail and refusal to return property would be penalties imposed for exercising a constitutional privilege, contrary to **Griffin v. California**, 380 U. S. 609, and **Spevack v. Klein**, 385 U. S. 511.

For the reason that the decision of the Court of Appeals is in conflict with the foregoing applicable decisions of this Court, we respectfully submit that certiorari should be granted as to Question VII.

VIII.

Whether the admission of testimony of an alleged expert witness, including his expression of opinions that a handbook was being operated, bets were being received, a line was being disseminated, and other information was being furnished, constituted an invasion of the province of the jury and deprived petitioner of a trial free from inadmissible evidence.

The Government called a Special Agent of the Federal Bureau of Investigation and attempted to qualify him as an expert witness to testify as to the operation of a handbook. After identifying exhibits, he expressed numerous opinions to the effect that "these are gambling paraphernalia of the type commonly associated with handbook operations" (Tr. 200), that they meant wagers were made (Tr. 201-203), that some of the documents were an account of the handbook (Tr. 204), that there was gambling activity on certain days (Tr. 213-214), and that the evidence he examined in connection with this case indicated "that there were both baseball and horse bets being taken" (Tr. 217).

The majority opinion of the Court of Appeals indicates that because gambling is a complex business, "a properly qualified expert may offer his opinion on relevant matters concerning the operation of a gambling enterprise." As-

suming, without conceding, that the witness was a properly qualified expert, we believe that the decision of the Court of Appeals is in conflict with the decision of the Second Circuit in **United States v. Sette**, 334 F. 2d 267, in which a conviction was reversed because the experts were permitted to express opinions. There is a distinction between the permissible identification of documents, as in **United States v. Angelini**, 7 Cir., 346 F. 2d 278, and the impermissible expression of opinions, as in the Sette case. The Eighth Circuit here failed to recognize the distinction.

The number of federal prosecutions and the area of involvement of the federal government in gambling matters is constantly increasing. Because of the conflict between the decision of this Court of Appeals and those of the Second and Seventh Circuits as to the use of expert witnesses in gambling cases, we respectfully submit that certiorari should be granted as to Question VIII.

IX.

Whether the admission of testimony concerning another handbook operation in another part of the City seven months prior to that charged, without evidence connecting the two alleged operations, deprived petitioner of a trial free from inadmissible evidence.

The indictment herein charged petitioner with interstate travel between August 6 and August 18, 1965, and performance of acts thereafter in a gambling enterprise. The Government, in its original bill of particulars, stated that petitioner had engaged in a handbook operation at 9745 Pauline Place in November and December, 1964, and January, 1965. On petitioner's motion, this information was stricken. (See Appendix G.) At that point, of course, petitioner was under the impression that no evidence pertaining to the alleged operation on Pauline Place would be admitted.

But during the course of the trial, the Court permitted the Government to introduce considerable evidence as to the alleged operation on Pauline Place, on the theory that it showed petitioner's intent and the operation of a business enterprise. The Court of Appeals justifies the admission of this evidence on the ground that petitioner's prior gambling activity conducted elsewhere tended to "prove the lack of innocent purpose in his present venture," although there was no proof of petitioner's participation in any present venture. The Court of Appeals also states that the evidence tended to prove that petitioner was "involved in a continuing 'business enterprise' rather than a single incident of gambling," but there was no evidence of petitioner's involvement in the later activity nor of any connection or continuity between the two activities.

Finally, the Court of Appeals holds that remoteness goes to weight rather than admissibility of the evidence, and that admission is discretionary with the trial court. In so ruling, we believe the Court is in error and in conflict with other Courts of Appeals.

In **Lloyd v. United States**, 5 Cir., 226 F. 2d 9, the Court stated (l. c. 18):

> "Evidence of other wrongful acts to prove intent must go further than showing that the defendant has a generally criminal disposition of character, and must logically tend to prove the defendant's criminal intent at the time of the commission of the act charged."

The evil in admitting such evidence was pointed out in **Drew v. United States**, D. C. Ct. App., 331 F. 2d 85, 89-90:

> "It is a principle of long standing in our law that evidence of one crime is inadmissible to prove dis-

position to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial legitimate purpose."

As to the issue of intent, see **Boyer v. United States**, D. C. Ct. App., 132 F. 2d 12, where the Court stated (l. c. 13):

> "But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are 'so connected with the offense charged in point of time and circumstances as to throw light upon the intent.'"

The evidence in this case was too remote in time and place. We submit that seven months of inactivity intervening between the two geographically disconnected operations was not similar to the reasonable time found in **United States v. Compton**, 6 Cir., 355 F. 2d 872, a case arising under 18 U. S. C., § 1952, where the Court said (l. c. 874):

> "The law is settled that evidence of a substantial course of illegal conduct occurring a **reasonable time before and after an act of interstate travel**, will allow a jury to infer that the travel was undertaken with the intent to carry on the unlawful activity." (Emphasis supplied.)

Because of this conflict with decisions of other circuits pertaining to the admissibility of evidence of other offenses, we respectfully submit that certiorari should be granted as to Question IX.

X.

Whether, in a jury instruction pertaining to the violation of Missouri law, the inclusion of offenses not prohibited or not proved, makes the instruction erroneous.

The Court's instruction (Tr. 294) was as follows:

> "The business enterprise involving gambling alleged to have been carried on by the defendant is operating a handbook, that is, accepting wagers on athletic contests and the furnishing of odds and point spreads on athletic contests. If you, the jury, find and believe from the evidence and beyond a reasonable doubt that the defendant did engage in accepting wagers on athletic contests and in furnishing odds or point spreads on athletic contests as a business enterprise, then I instruct you as a matter of law that such activity violates the law of the State of Missouri, as set out in Section 563.360 of the Missouri Revised Statutes of 1959."

A reading of the Missouri statute set forth in Appendix C shows that the instruction expanded the offense covered by the statute. The furnishing of odds or point spreads, characterized by the trial court as part of a handbook operation, is not a violation of Section 563.360, and, in fact, the use of the term "handbook" injected something beyond the scope of the statute. Thus, the jury was permitted to convict on evidence broadening the statute, contrary to the decision of the Supreme Court of Missouri in **State v. Oldham**, Mo. Sup., 98 S. W. 497, which holds that the statute must be strictly construed. Although as stated in **State v. Huber**, Mo. Sup., 263 S. W. 94, the actual recording or registering of a bet was the offense denounced by the statute, there was here no evidence that petitioner had committed any such offense. Even if the evidence of Mr. Miller was admissible and

even if the search was legal, there was no evidence of the acceptance of any bets by petitioner or anyone else during the period covered by the indictment.

The Court of Appeals, in approving the foregoing instruction, interprets Missouri law in conflict with the applicable law as determined by the Supreme Court of Missouri. For this reason, we respectfully submit that certiorari should be granted as to Question X.

XI.

Whether lack of positive evidence of essential elements of the offense charged against petitioner, his intent and the commission of an overt act, except such as may possibly be created by inferences based upon inferences, vitiates petitioner's conviction.

The three basic elements of the crime charged by an indictment under 18 U. S. C., § 1952, are: travel in interstate commerce, guilty intent, and overt acts subsequent to travel with the necessary intent. The opinion of the Court of Appeals finds evidence of intent and overt acts by inference only. We believe the opinion is in error because no proper inferences could be drawn to supply these two essential elements of the offense.

On the issue of intent, the opinion permits "the jury to infer that the purpose of the trip was motivated by the gambling operation." Inasmuch as there was no direct proof of any gambling operation during the period alleged in the indictment, such a gambling operation could only be established by an inference based upon the evidence of prior operations on Pauline Place and the opinions of Dr. Miller, assuming such evidence was properly admitted. To infer the necessary intent necessitates an inference based upon an inference, which is improper under **Ingram v. United States**, 360 U. S. 672, 680.

Similarly with reference to the overt act, the opinion permits an improper inference based upon inferences. The Court of Appeals requires that "some overt act directed to the illegal gambling activity" be proved, but the record is devoid of any such act after the dates of travel alleged in the indictment. (As previously noted, the overt act must be subsequent to the travel.)

The majority opinion infers proof of an overt act from petitioner's visits to an apartment which was the scene of inferred gambling activity, but there was no evidence of any act by petitioner, except that he was there. At the most, this was an inference based upon an inference. The statement that petitioner had a key to the apartment overlooks the fact that another person also had a key (Tr. 184), and the inference could be just as easily drawn that the other person operated the inferred handbook. The opinion also infers proof of an overt act from the fact that petitioner was in the room alone with the gambling paraphernalia, and yet there was no proof from the Government's handwriting expert nor anyone else that petitioner did anything while he was in the room (Tr. 221). There is nothing in the record to prove or even infer the necessary overt act.

Although factual comparisons with other cases are not entirely satisfactory, the evidence found here by the Eighth Circuit to be sufficient was not as strong as that which was held insufficient by the Fourth Circuit in **United States v. Honeycutt**, 311 F. 2d 660, where there was actual evidence that defendant had sold some gambling equipment.

In **United States v. Hawthorne**, 4 Cir., 356 F. 2d 740, the Government was held to strict proof of the purpose of the interstate trip and the proof was not sufficient to show an unlawful purpose. There the Court stated (l. c. 742):

> "It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act (cases cited). . . . In the instant case, however, the essential element of the crime is the interstate travel of the offender himself. We do not rest our decision on the fact that the first proven overt act of gambling did not occur until nearly five months after the trip in question. Other trips Hawthorne took prior to that charged in count one of the indictment were directly related to his enterprise, but the connection with this specific trip is too tenuous."

Specific proof of an overt act related to a specific act of interstate travel is required. Even the Government's evidence in the instant case as to the meaning of documents found after the search related to sporting events taking place on dates with which petitioner was not charged with traveling in interstate commerce (Tr. 213).

The instant case might have created some suspicion as to the defendant's activities, but suspicion is not sufficient to convict. In a narcotics case in which there was substantially more suspicion than in the present case, **Ong Way Jong v. United States**, 9 Cir., 245 F. 2d 392, the court used language which would be particularly applicable to petitioner (l. c. 394):

> "No evidence has been adduced which definitely proves that (the defendant) was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis."

Suspicion, speculation, surmise and inference are not sufficient to sustain a conviction. **United States v. Barnes**, 9 Cir., ... F. 2d ..., No. 17,181, decided October 7, 1967.

Because of the approval by the Eighth Circuit of a conviction without evidence, which we believe is a departure from the basic constitutional requirement that there must be evidence of guilty conduct before there can be a finding of guilt, and because of the apparent conflict with cases of the Fourth and Ninth Circuits involving the evidence necessary to convict under the same statute, we respectfully submit that certiorari should be granted as to Question XI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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